82-912

No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

v.

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether 47 U.S.C. 399, which prohibits "editorializing" by noncommercial educational broadcasting stations that receive grants from the Corporation for Public Broadcasting, violates the First Amendment.

PARTIES TO THE PROCEEDING

In addition to the appellee named in the caption, the appellees include Pacifica Foundation and Henry Waxman.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and statutes: Page

Miscellaneous:

Constitution and statutes—Continued Page

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OPINION BELOW

The opinion of the district court (App. A, *infra*, 1a-20a) is reported at 547 F. Supp. 379.

JURISDICTION

The judgment of the district court (App. B, *infra*, 21a-22a) was entered on August 5, 1982. The notice of appeal (App. C, *infra*, 23a) was filed on September 3, 1982. On October 26, 1982, Justice Rehnquist extended the time for docketing an appeal until December 1, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the Constitution provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

2. 47 U.S.C. 399, as amended by the Public Broadcasting Amendment Act of 1981, Section 1229, Pub. L. No. 97-35, 95 Stat. 730, provides:

> No noncommercial educational broadcasting station which receives a grant from the Corporation [for Public Broadcasting] under subpart C of this part may engage in editorializing. No noncommercial educational broadcasting station may support or oppose any candidate for political office.

STATEMENT

1. Congress enacted the Public Broadcasting Act of 1967, 47 U.S.C. (& Supp. IV) 390 *et seq.*, in order "to encourage the growth and development of public radio and television broadcasting, including the use of such media for instructional, educational and cultural purposes" (47 U.S.C. (& Supp. IV) 396). To achieve these goals, Congress made considerable financial assistance available "to assist in providing the broadcast facilities necessary to carry educational radio and television programs * * * [and to encourage the development of] programs of high quality, responsive to the cultural and educational needs of the people" (S. Rep. No. 222, 90th Cong., 1st Sess. 2 (1967)). At the same time, Congress wanted to prevent the government's substantial financial support from subjecting public broadcasters to

undue political influence or pressure.[1] Thus, to ensure that the discussion of important public issues would not be distorted by government funding, Congress enacted several safeguards, including the predecessor of the provision at issue in this case.[2]

In its original form, 47 U.S.C. 399 stated that "[n]o noncommercial educational broadcasting sta-

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[1] See 113 Cong. Rec. 26383 (1967) (remarks of Rep. Staggers: "[A] concern, shared by all members of the committee [is] that the proposed [Legal Broadcasting] Corporation could become an instrument for political propaganda. We think we have solved the problems with extensive legislative language in the bill"); *id.* at 26392 (remarks of Rep. Watson: "There is another potential danger. This Corporation could [become] a propaganda monster * * *"); *id.* at 26394 (remarks of Rep. Brotzman: "The fear of Government control of programming was recurrent during consideration of this bill by my committee. [The amendment that, inter alia, prohibits editorializing] will prevent this corporation from becoming a Government propaganda tool"); *id.* at 26399 (remarks of Rep. McClure: "[I am concerned that] programs produced by the Corporation will be used for propaganda purposes, to encourage a particular political philosophy or to keep a political party in power"); *id.* at 26407 (remarks of Rep. Springer); *id.* at 26408 (remarks of Rep. Brown); *id.* at 26412 (remarks of Rep. McCormack).

[2] In addition to the prohibition against editorializing and supporting political candidates, the Act now provides that many federal grants to public broadcasting are to be made by a private, nonprofit corporation, the "Corporation for Public Broadcasting"; that members of the Corporation's board of directors may not be employees or officers of the United States; that no more than six of the 10 members of the board may belong to the same political party; and that the corporation may not own or operate any public broadcasting station (95 Stat. 725-726, 47 U.S.C. 396(c)). In addition, no federal official is authorized to direct or control any of the corporation's activities or to direct or control the content or distribution of programs (47 U.S.C. 399).

tion may engage in editorializing or may support or oppose any candidate for political office." The Federal Communications Commission has construed "editorializing" to mean only the "use of noncommercial educational broadcast facilities by licensees, their management or those speaking on their behalf for the propagation of the licensees' own views on public issues * * *." *In re Complaint of Accuracy in Media, Inc.*, 45 F.C.C.2d 297, 302 (1973).[3] Accordingly, broadcasters are not precluded from airing programs advocating controversial views as long as editorials are not issued in the broadcaster's name. Congress took pains to "emphasize[] that these provisions [prohibiting editorializing] are not intended to preclude balanced, fair, and objective presentations of controversial issues by noncommercial educational broadcast stations" (H.R. Rep. No. 794, 90th Cong., 1st Sess. 12 (1967)).

When the original act was passed, it was generally assumed that all public broadcasting stations would receive government funding, and the prohibition against editorializing extended to all public broadcasters.[4] That assumption proved unfounded,[5] and

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[3] The Federal Communications Commission is charged with the administration of 47 U.S.C. 399. See 47 U.S.C. 151.

[4] See, *e.g.*, 113 Cong. Rec. 26416 (1967) (amendment proposed by Rep. Devine, which would have authorized $5 million to be "divide[d] equally and distribute[d] among educational broadcasting stations in the United States which are in existence on the date of enactment").

[5] In 1970, as described by the Carnegie Commission on the Future of Public Broadcasting, the Corporation for Public Broadcasting determined to target its grants so as "to create a core of well-financed, professional stations * * * [and] to encourage stations seeking CPB aid [who were] dedicated to

47 U.S.C. 399 was amended in 1981 so that the prohibition of editorializing would extend only to those stations that receive Corporation for Public Broadcasting funds (Public Broadcasting Amendment Act of 1981, Pub. L. No. 97-35, 95 Stat. 725 *et seq.*).

2. Appellee Pacifica Foundation is a non-profit educational corporation that owns and operates noncommercial educational broadcasting stations in five major markets (App. A, *infra*, 6a). Its licensees receive Corporation for Public Broadcasting grants and are therefore prohibited from editorializing (*ibid.*). In 1979, Pacifica and others [6] brought this suit in the United States District Court for the Central District of California challenging the constitutionality of the provisions of 47 U.S.C. 399 that prohibited public broadcasters from editorializing or supporting candidates for political office. In October 1979, former Attorney General Civiletti informed the Senate that the Department of Justice would not defend the constitutionality of the statute, in part because it applied to all public broadcasting stations and not just to those receiving federal aid. The Senate then adopted a resolution, pursuant to 2 U.S.C. (Supp. V)

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general educational or cultural service, rather than strictly institutional service or religious programming * * *." Carnegie Commission, *A Public Trust: The Report of the Carnegie Commission on the Future of Public Broadcasting* 189 (1979).

[6] The League of Women Voters of California and Representative Henry Waxman are also plaintiffs in this suit. The district court did not resolve whether these plaintiffs have standing to bring this action since their complaint, as ultimately amended, did not seek relief independent of that sought by Pacifica (App. A, *infra*, 7a).

288e(a), directing its counsel to intervene as amicus curiae and defend the suit (App. A, *infra*, 3a & n.3).[7]

In April 1981, Attorney General Smith notified the Senate that the Department of Justice would defend the statute and noted that the statute could be narrowly construed to avoid constitutional defects. The government subsequently urged the district court to uphold the constitutionality of the statute at least insofar as it applied to publicly-funded stations. See Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment 11-20. While the suit was pending, Congress enacted the recent amendment of 47 U.S.C. 399 that expressly confines the prohibition of editorializing to those stations that receive Corporation for Public Broadcasting funds. Thereafter, appellees amended their complaint and abandoned their attack upon the portion of the statute forbidding public broadcasters to endorse political candidates (App. A, *infra*, 5a). Their sole remaining claim was that the prohibition of editorializing violates the First Amendment (*ibid.*).

3. The district court granted summary judgment in favor of appellees (App. B, *infra*, 21a-22a). The court first concluded (App. A, *infra*, 11a) that "Section 399 can survive scrutiny under the First Amend-

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[7] The district court granted the Senate's motion to dismiss the complaint on the ground that there was no justiciable controversy because the government had decided not to enforce the statute (App. A, *infra*, 4a). Plaintiffs appealed, and during the pendency of the appeal, the Attorney General notified the court of appeals of his decision to defend the suit. The court of appeals then remanded the case to the district court; the district court vacated its order of dismissal; and the Senate Legal Counsel withdrew from the litigation (*ibid.*).

ment only if * * * it serves a compelling government interest and is narrowly tailored to that end." Observing that "regulations such as § 399 are presumptively unconstitutional," the court then held that Section 399 was not supported by any compelling government interest (*ibid.*).

The court refused to accept the contention (App. A, *infra*, 11a) that "§ 399 serves a compelling government interest in ensuring that funded noncommercial broadcasters do not become propaganda organs for the government." The court noted (App. A, *infra*, 12a-13a) that "[Corporation for Public Broadcasting] funding in 1977 did not constitute more than approximately 25%" of the budget of the average station receiving such aid, that "no broadcaster receives more than approximately 33% of its funds through [such] grants," that Pacifica allegedly received only 14% of its total revenue from such grants, and that the amount of Corporation for Public Broadcasting funding was being reduced. The court also concluded (*id.* at 13a-14a) that fear of government pressure was unfounded because the Corporation for Public Broadcasting "is an independent, nonprofit, private corporation"; because the Corporation's "funding decisions are based on objective, nondiscretionary criteria"; and because the "fairness doctrine"[8] prevents broadcasters from presenting "one-sided political propaganda."

The court similarly rejected (App. A, *infra*, 15a) the government's contention that "restrictions on

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[8] The "fairness doctrine" imposes on all broadcasters—public and commercial—two affirmative responsibilities: "coverage of issues of public importance must be adequate and must fairly reflect differing viewpoints." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 111 (1973).

editorializing are necessary to ensure that government funding of noncommercial broadcast stations will not interfere with the balanced presentation of opinion on those stations." The court found no evidence that Congress had enacted Section 399 for that purpose and that, in any event, such a "concern [was] not sufficiently compelling to justify the ban on speech imposed by § 399 under the First Amendment" (App. A, *infra*, 17a).[9]

THE QUESTION IS SUBSTANTIAL

The district court has declared unconstitutional an important statutory provision that not only serves the vital function of insulating government-funded public broadcasting stations from political influence but also prevents the use of public funds to propagate controversial private views. The court apparently attached no legal significance to the fact that the provision of 47 U.S.C. 399 regarding editorializing now applies only to those stations that voluntarily accept Corporation for Public Broadcasting grants. The court therefore applied an unduly strict test in deciding whether that provision satisfies First Amendment standards. Based largely upon its own sanguine assessment of the possibility of government pressure upon public broadcasters, the court also seriously underestimated the substantial and legitimate interest served by the provision against editorializing.

Congress recently reviewed the need for the provision on editorializing and decided to retain it in revised form, both because it was Congress' judgment

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[9] Because the court held that Section 399 violates the First Amendment, the court did not rule upon Pacifica's claim that that provision also violates the equal protection guarantee contained in the Due Process Clause of the Fifth Amendment (App. A, *infra*, 18a-20a).

that the provision meets First Amendment standards and because Congress continued to believe that it serves important public needs. This Court should note probable jurisdiction to review the district court's exercise of "the grave power of annulling an Act of Congress." *United States* v. *Gainey*, 380 U.S. 63, 65 (1965).

1. The district court plainly erred in holding (App. A, *infra*, 11a) that the prohibition of editorializing by certain public broadcasting stations "can survive scrutiny under the First Amendment only if * * * it serves a compelling government interest and is narrowly tailored to that end." Because the prohibition of editorializing applies only to those broadcasters who voluntarily receive certain government grants, that provision is a legitimate exercise of Congress' Spending Power. "Congress has frequently employed the Spending Power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives. This Court has repeatedly upheld against constitutional challenge the use of this technique to induce governments and private parties to cooperate voluntarily with federal policy" (*Fullilove* v. *Klutznick*, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.)).

This Court has never held or suggested that restrictions on expression imposed as conditions to the receipt of federal funds must be supported by a compelling government interest, and it is apparent that any such blanket rule would lead to absurd results. Certainly Congress may direct that federal funds be spent for a particular purpose and not for others without demonstrating a compelling reason for its

choice. For example, Congress has prohibited the unauthorized use of federal funds for lobbying (18 U.S.C. 1913) even though lobbying is protected by the First Amendment. Congress has also prohibited the International Communication Agency (the successor of the United States Information Agency and the Voice of America) from disseminating information within this country (22 U.S.C. (Supp. IV) 1461), despite the fact that such a restriction would certainly violate the First Amendment if applied to a private news organization. If Congress had chosen to establish a state-owned broadcasting system, as most countries have, rather than subsidizing private noncommercial stations, there seems little doubt that Congress could have prohibited officers and employees of the system from "editorializing" in the name of the system.[10]

The prohibition of editorializing at issue here, while not strictly analogous, nevertheless shares many of the characteristics of the restrictions noted above. Recognizing that Corporation for Public Broadcasting grants are generally unrestricted and thus assist all aspects of a station's operations (see 47 U.S.C. (Supp. IV) 396(k)(7)), Congress in essence has insisted that no portion of those grants be used for editorializing. To be sure, the stations

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[10] Other, even more obvious, examples come readily to mind. For example, privately employed scientists undoubtedly have the constitutional right to choose their own areas of study, but a scientist who accepts a government grant to conduct research in a certain area may be required to abide by the terms of the grant even if the government cannot demonstrate a compelling interest in obtaining research in the area it has chosen rather than in another area viewed by the scientist as more beneficial.

affected by the provisions on editorializing are not government-owned and receive only a portion of their revenue from the federal government. In addition, such stations may claim that their editorials are produced and broadcast solely with private funds. But despite these differences it seems clear that a compelling interest test is inappropriate in this context since the provision at issue does not seek to regulate private speech but rather attempts to prevent misuse of public funds.

Even where the question of misuse of public funds is much less directly involved than it is here, conditions restricting expression may be attached to the receipt of federal funds without showing a compelling need for those conditions. For example, as a condition of their compensation from the public treasury, government employees may be subjected to restrictions on off-the-job expression that would be unconstitutional if applied to other persons. A federal employee may not hold office in a political party, work at the polls, organize a political party or club, participate actively in partisan fund-raising, become a candidate or campaign for many elective offices, actively manage a partisan campaign, solicit votes for a partisan candidate, serve as a delegate to a political convention, or engage in other forms of political activity that would otherwise be protected by the First Amendment. 5 U.S.C. 7324; *CSC* v. *Letter Carriers*, 413 U.S. 548 (1973). In a similar vein, government contractors may not make political contributions during the life of a government contract (2 U.S.C. 441c) even though the First Amendment protects a citizen's right to contribute to a candidate or political organization (see *Buckley* v. *Valeo*, 424 U.S. 1, 22-23 (1976)).

In reviewing the constitutionality of restrictions imposed upon public employees' expression off the job, this Court has not applied a compelling interest test but has balanced the "interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees" (*Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968); see also *CSC* v. *Letter Carriers*, *supra*, 413 U.S. at 564). If such a balancing test is applied in this case, then the prohibition of editorializing satisfies First Amendment standards.[11] That prohibition

[11] Even if the prohibition of editorializing applied to all noncommercial broadcasting stations, the test employed by the district court would be incorrect. Because of the scarcity of broadcast frequencies (see *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 388 (1969), the government may take reasonable steps to allocate this scarce public resource fairly, even though comparable measures would not be permitted with respect to the print media or other forms of expression. For example, a broadcaster may be deprived of his license if the Federal Communications Commission determines that such an action would serve "the public interest, convenience, and necessity." 47 U.S.C. 309(a). See *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946). In the interest of diversifying control of the media of mass communications, the FCC may "den[y] [broadcasting] licenses to newspapers owners." *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 794 (1978). Broadcasters may be required to grant those whom they criticize the use of their facilities to reply to the attacks. Compare *Red Lion Broadcasting Co.* v. *FCC*, *supra* (fairness doctrine constitutional), with *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974) (statute providing right to reply in newspaper unconstitutional). This Court has not demanded proof of a "compelling" government interest when called upon to assess the validity of such laws, which do not seek to regulate any particular point of view but, like

serves at least two substantial government interests and does not severely restrict freedom of expression.

2.a. Both when the Public Broadcasting Act was enacted in 1967 and when 47 U.S.C. 399 was recently amended, Congress concluded that restrictions on editorializing were required to insulate public broadcasting stations from political influence and to prevent political considerations from affecting the distribution of federal funds.[12] On both occasions Congress noted that editorial policy could not help but be affected by public subsidies. As one Congressman remarked:

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47 U.S.C. 399, simply attempt to keep the "market-place of ideas" (*Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 390) free of distorting influences. Rather than insisting upon proof of a compelling government interest in such circumstances, this Court has balanced the public interests sought to be served by the regulation against the restrictions placed upon broadcasters. See, *e.g.*, *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 386-392. Such an approach is appropriate to the provision at issue here, which seeks to allow the government to support educational and cultural broadcasting without distorting public discussion of important and controversial issues.

[12] In 1967, Congress noted that "[c]onsiderable testimony was heard that no noncommercial educational station editorializes," but nevertheless forbade editorializing "[o]ut of an abundance of caution." H.R. Rep. No. 572, 90th Cong., 1st Sess. 20 (1967). The district court failed to note the context in which the phrase "[o]ut of an abundance of caution" was used and therefore came to the incorrect conclusion that Congress believed that other provisions of the Public Broadcasting Act were sufficient to shield public broadcasters from political pressures (App. A, *infra*, 15a). Instead, however, Congress viewed the problems posed by editorializing as so significant that it prohibited editorializing even though it was not then practiced by any public broadcasting station.

> I think it would be a tremendous mistake to put the pressure for editorializing * * * on [public broadcasting] stations * * *.
>
> It occurs to me, for example, if the Des Moines Register in my own State were receiving public funds its editorial policy would be substantially different or otherwise, it would * * * no longer be relying on those Federal funds.
>
> If it were relying on public funds, it could not speak as it does about members of Congress, members of the Iowa Legislature. * * * [It] would probably tend to pull punches. I think worse than having no editorial at all is a station that editorializes while at the same time pulling punches. I suspect there would be some subject matters that would not be covered at all or otherwise, subject matters that would be covered in a way that would not be desirable.

Hearings on H.R. 3238 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce, 97th Cong., 1st Sess. (1981) (remarks of Rep. Tauke). See also page 3, note 1, *supra*.

If public broadcasting stations were permitted to editorialize, they might well feel considerable pressure to broadcast editorials pleasing to those responsible for or able to influence the distribution of federal funds. Similarly, if publicly-funded stations became associated with particular editorial positions, it would be difficult to prevent political considerations from influencing decisions regarding the distribution of federal funds. One need only envision the political pressure that would inevitably be brought to bear if newspapers and magazines with well-known political leanings were financially dependent upon discretionary federal aid.

Congress is unquestionably experienced in such matters and most capable of assessing the degree to which the provision of public funds can cause disruptive influence. Accordingly, Congress' judgment in such areas is entitled to considerable judicial respect. See *CSC* v. *Letter Carriers*, *supra*, 413 U.S. at 566-567 ("[F]or many years the joint judgment of the Executive and Congress has been that to protect the rights of federal employees with respect to their jobs and their political acts and beliefs * * * '[it is necessary to proscribe] active participation in partisan political management and partisan political campaigns.' * * * [T]hat is [Congress'] current view of the matter, and we are not now in any position to dispute it.")

The district court's reasons for concluding that 47 U.S.C. 399 is not needed to insulate public broadcasters from political pressures are not reassuring. The court first relied (App. A, *infra*, 13a) upon the "modest level" of funding provided by the Corporation for Public Broadcasting. The court noted (*id.* at 12a-13a) that for the average stations affected by the provision on editorializing such grants constituted not more than approximately 25% of their operating budgets in 1977, that for no such station did that figure exceed approximately 33% of its budget, and that only 14% of appellee Pacifica's revenue was allegedly derived from Corporation for Public Broadcasting grants. The flaws in the court's reasoning are manifest. There are myriad companies, and presumably many public broadcasters, for which even a 14% decrease in net income would spell bankruptcy, and there are undoubtedly many more for which the result would be a significant curtailment of operations with the loss of jobs, salary cuts, and other un-

pleasant consequences. The government is by far the greatest single source of funding for public broadcasters, and alternative sources of funding capable of compensating for withdrawn government assistance are not available. See Carnegie Commission, *A Public Trust: The Report of the Carnegie Commission on the Future of Public Broadcasting* 93-149 (1979). Accordingly, the potential influence that the government may wield as a result of its funding decisions is substantial.[13] In addition, the relevance of the figures cited by the court is doubtful because the availability of matching funds from the Corporation for Public Broadcasting induces private contributions. See 47 U.S.C. (Supp. IV) 396(k)(6)(B)(ii); Carnegie Commission, *supra*, at 123-127.[14]

The district court also suggested (App. A, *infra*, 13a) that the fear of undue government influence was "even more speculative" because of the "protec-

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[13] For example, the Carnegie Commission noted that corporations, which provide a significantly smaller amount of funds to public broadcasting stations, have "undoubtedly skewed the total schedule in the direction of cultural programs which are popular among the 'upscale' audiences that corporations prefer. Controversial drama, documentaries, public affairs, and programs for minorities must then compete for remaining discretionary money." "[E]ditorial freedom does not thrive in such circumstances." Carnegie Commission, *supra*, at 107, 105.

[14] Federal agencies other than the Corporation for Public Broadcasting, such as the Departments of Education and Commerce, the National Endowment for the Arts, and the National Endowment for the Humanities, as well as state and local governments, provide substantial funding for noncommercial broadcasting stations. See Carnegie Commission, *supra*, at 101, 113. Hence, if such stations were permitted to editorialize, their incentive to express views they believe would please the government would be far greater than the district court's percentages suggest.

tive insulation" provided by the Corporation for Public Broadcasting. However, Congress had good reasons to regard that insulation as insufficient. First, although we certainly do not mean to suggest that the Corporation has not faithfully discharged its duty, it is far from clear that the structure of that body makes its use for partisan or ideological ends impossible. The Corporation is governed by a 10-person board of directors appointed to five-year terms by the President with the advice and consent of the Senate (95 Stat. 726, 47 U.S.C. 396(c)(1) and (4)), and a majority of the Board may belong to the same political party (95 Stat. 726, 47 U.S.C. 396(c)(1)). Thus, a majority of the board could seek to promote the party to which they belong. Moreover, board members from both parties might share a distaste for the minority views expressed by certain broadcasters. Second, even if the Corporation's board of directors did not pressure recipient stations, such pressure might well be exerted by the Corporation's officers or employees, who might have strong personal views on certain editorial subjects. Third, regardless of whether the Corporation in fact took broadcasters' editorial positions into account in making funding decisions, stations might believe that the Corporation would do so. Finally, the Corporation cannot insulate public broadcasters from general funding decisions made by Congress in response to unfavorable editorials.[15]

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[15] The district court relied (App. A, *infra*, 13a) upon the fact that Corporation for Public Broadcasting grants are distributed according to "objective, nondiscretionary criteria." Neutral formulas, however, obviously cannot affect the total appropriation for such grants. Perhaps more important, Congress was not unduly cynical in judging that a system of neutral laws does not always suffice to prevent partisan or

In addition, the district court relied upon the "fairness doctrine," but Congress certainly had a reasonable basis for concluding that the fairness doctrine is not adequate by itself to insulate noncommercial stations from political pressure. Despite the fairness doctrine, a group or person capable of wielding influence might well desire that a public broadcasting station take a favorable editorial position on a controversial subject. If such an editorial was broadcast, all that the fairness doctrine would require is the provision of reply time for persons with opposing points of view. See *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 378 (1969). Thus, proponents of a particular point of view might well believe that an editorial endorsed by a "public" television or radio station would carry far more clout than any response by a private individual or a spokesman for a private group.[16]

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ideological bias from affecting the implementation of those laws.

In this regard, the district court cited a passage in the Carnegie Commission report that noted that the system of matching grants by which federal funds are allocated among stations " 'is well positioned to avoid review of program content as a condition for increased funding' " (App. A, *infra*, 14a n.8, quoting Carnegie Commission, *supra*, at 124). The district court, however, failed to note the Commission's conclusion that while "the theory of a matching formula for funding public broadcasting is sound * * * [in actual practice] the purpose of [the plan]—the insulation from annual political review of the system—has been undermined." Carnegie Commission, *supra*, at 125-126.

[16] At one time, all broadcasters were forbidden to editorialize. See, *e.g.*, *In re The Mayflower Broadcasting Corp.*, 8 F.C.C. 333, 340 (1940) ("[A]s one licensed to operate in a public domain the licensee has assumed the obligation of presenting all sides of important public questions * * *. The public interest—not the private—is paramount.") In 1949,

In sum, the prohibition of editorializing serves a highly important government interest because the other safeguards upon which the district court relied are insufficient to shield publicly-funded broadcasters from political pressures. Indeed, despite all these protections, the Carnegie Commission wrote in 1979: "[W]e have heard testimony on numerous examples of federal agency interference in program content, pressures on the system from congressional and administrative sources, and a widespread apprehension in the system after experiencing what it perceived as threats to its survival." Carnegie Commission, *supra*, at 101. Far more knowledgeable than the district court about the use of political power and influence, Congress accurately assessed the need to ban editorializing by stations that receive certain federal grants, and its judgment should have been honored.

b. The prohibition of editorializing serves a second highly important government interest not discussed by the district court: it prevents the use of taxpayers' money to promote controversial private views and thus obviates potential First Amendment problems. In *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 234-235 (1977), this Court held that citizens may not be compelled to contribute to organizations that promote ideological causes with which the contributors may not agree. This is so because "contributing to an organization for the purpose of spreading a political message," as well as refraining from making such contributions, is protected by the

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the FCC supplanted this approach with the "fairness doctrine" (*Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 377). However, the Commission was there dealing with commercial stations, which of course are far less susceptible to government influence than are stations heavily dependent upon government funds.

First Amendment (431 U.S. at 234). It might therefore raise constitutional problems to collect tax money from unwilling contributors and then give it to television and radio stations for the purpose of propagandizing concerning editorial positions with which a great many taxpayers might disagree.[17] This problem is magnified because of the tremendous power of the broadcast media, the scarcity of broadcast frequencies (see *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 388), and the ironic fact that government-funded "public" television stations may be less answerable to the public than commercial stations dependent upon ratings for advertising revenue.

Thus, the use of tax dollars to subsidize editorializing by the owners of noncommercial broadcasting stations is not unlike the expenditure of large amounts of public funds to propagate the views held by persons who happen to own any other business—say, shoe stores or supermarkets. The rationality and fairness of such a scheme would certainly be open to question. As one member of Congress put it (*Hearings on H.R. 3238 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess. (1981) (remarks of Rep. Moorhead):

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[17] When commercial broadcasters choose to advance their private "political, social, and economic views [they are] bounded by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers" (*Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 117 (1973) (opinion of Burger, C.J.)). In the case of noncommercial stations, the first factor may be less important. Private contributions supply only part of their budgets, and those able to make such contributions may not constitute a representative sample of the audience.

> There is nothing in the First Amendment that guarantees that the Federal Government will give one person a bigger horn than somebody else for the exercise of his rights.
>
> When we pay for public broadcasting we are giving them a tremendous voice. If they are going to be allowed to editorialize with Federal money then they have a tremendous advantage over other points of view that may be just as valid.

Congress' judgment concerning the protection of First Amendment interests in this area is entitled to respect. See *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 102-103 (1973).

3. On the other side of the balance, the restriction upon expression by noncommercial educational stations is not severe. The FCC has interpreted "editorializing" to mean only the expression of a licensee's views by its management or a management spokesman (*In re Complaint of Accuracy in Media, Inc.*, *supra*, 45 F.C.C.2d at 302). The Commission has stated (*ibid.*) that the prohibition of editorializing permits "the expression of views on public issues by employees of a noncommercial educational broadcast station in their capacity as individuals * * * provided the surrounding facts and circumstances do not indicate that such views are represented or intended as the official opinion of the licensee or its management." Therefore, 47 U.S.C. 399 allows station employees, journalists, academics, experts, and all other persons to express their views freely. Subject to the fairness doctrine, political figures may be invited to give their opinions. Any news subject may be covered in any manner. Any documentary or entertainment show may be aired. Any spokesman for any group may be permitted to speak or may be inter-

viewed by any interviewer of management's choice. In addition, the prohibition of editorializing is strictly neutral; it makes no effort to restrict only those expressions of opinion with which those in positions of authority might disagree.

Moreover, any station that finds the ban on editorializing unduly restrictive may simply decline Corporation for Public Broadcasting grants. If such grants constitute only a small percentage of a station's budget, as the district court seemed to believe (see App. A, *infra*, 12a-14a), then the burden of doing without them should not be great. If, on the other hand, the station could not continue operations without such grants, then management cannot legitimately claim the right to express its own views with public funds.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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DECEMBER 1982

APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV-79-1562-MML

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, HENRY WAXMAN and PACIFICA FOUNDATION, PLAINTIFFS

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT

[Filed Aug. 5, 1982]

ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS

This action presents a constitutional challenge to that portion of 47 U.S.C.A. § 399 (West Supp. 1982) ("§ 399") which prohibits certain noncommercial educational television and radio stations[1] from editorializing in their broadcasts. Before turning to the issues raised by this challenge it will be useful to set out the rather complex history of this litigation.

A milestone in the history of public broadcasting in the United States was reached with the enactment

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[1] Such stations are also known as "public" broadcasting stations. The Court will use the terms "noncommercial educational" and "public" interchangeably.

of the Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 368 (1967) (codified at 47 U.S.C. §§ 390 *et seq.*) The Act provided federal financial assistance for public broadcasting and established a non-profit, private corporation, the Corporation for Public Broadcasting ("CPB"), to oversee distribution of this funding and to assist and encourage the development of public television and radio stations in the United States. The Public Broadcasting Act also contained a provision prohibiting all public broadcasting stations from editorializing and from supporting or opposing any candidate for political office. This provision was codified at 47 U.S.C. § 399.[2]

The instant suit, challenging the constitutionality of § 399, was filed on April 30, 1979 against the Federal Communications Commission ("FCC"). Plaintiffs argued that prohibiting all public television and radio stations from editorializing and from supporting or opposing any political candidates violated both the First Amendment's guarantee of free speech and the Equal Protection Guarantee embodied in the Due Process Clause of the Fifth Amendment. Because this challenge presented primarily legal issues rather

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[2] As promulgated in 1967, 47 U.S.C. § 399 provided: "No noncommercial educational broadcasting station may engage in editorializing or may support or oppose any candidate for political office." In 1973 a new subsection, § 399(b), was added to § 399. This addition which is otherwise not relevant to the present action, required the redesignation of the original § 399 as § 399(a). The new subsection was deleted in 1981 and § 399(a) was again designated as § 399. At the same time § 399 was amended as discussed below. In order to avoid confusion, the court will refer to "§ 399" in discussing the history of this case despite the fact that the statute under scrutiny was designated "§ 399(a)" throughout most of this litigation.

than factual disputes, plaintiffs were able to move for summary judgment several months after filing the complaint.

Rather than file opposition papers to this motion, the United States Department of Justice, acting as attorney for defendant, notified the Court that it would not defend the constitutionality of § 399. Plaintiffs' motion for summary judgment was continued by stipulation to enable defendant to present the matter to Congress so that it could consider the matter and take whatever action within its power it deemed proper.

On January 17, 1980 the Senate Legal Counsel, acting on behalf of the United States Senate, moved for leave to appear as *amicus curiae* in this action.[3] On that same date, the Senate also noticed a motion to dismiss the complaint on the alternate grounds that this action did not present a ripe case or controversy between adverse parties and that plaintiffs had failed to exhaust mandatory administrative procedures. Plaintiffs subsequently moved to disallow the filing of the Senate's motion to dismiss. Concurrent briefing

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[3] Section 706(a) of the Ethics in Government Act of 1978, 2 U.S.C.A. § 288e(a) (West Supp. 1982) provides that the Senate may direct its counsel to appear as *amicus curiae* in its name in any legal action in which the powers and the responsibilities of Congress under the Constitution are placed in issue. Pursuant to this section, the Senate adopted Senate Resolution 328, directing the Senate Legal Counsel to appear in this case as *amicus curiae* in the name of the Senate. 125 Cong. Rec. S19431. Section 713(a) of the Ethics in Government Act, 2 U.S.C.A. § 288*l*(a) (West Supp. 1982) provides that permission to appear as *amicus curiae* under § 706 "shall be of right." Permission may be denied only on an express finding that the appearance is untimely or that standing to intervene has not been established under Art. III. *Id.*

schedules were established for these two motions as well as for the Senate's motion to appear as *amicus curiae* and oral argument of all three of the motions was heard on March 3, 1981. On March 10, 1981 the Court granted the Senate's motion for leave to appear as *amicus curiae* and denied plaintiffs' motion to disallow the filing of the Senate's motion to dismiss. The Court then granted the Senate's motion to dismiss. *League of Women Voters of California* v. *FCC*, 489 F. Supp. 517 (C.D.Cal. 1980). In ordering the dismissal of the action, the Court held that, in light of evidence that the FCC would not enforce § 399 and the refusal by defendant's counsel to defend the constitutionality of the statute, there was no justiciable case or controversy. As a result, the Court was without jurisdiction to decide the issues presented and dismissal was required.

Plaintiffs appealed this order of dismissal. Pending argument of the appeal, on April 9, 1981, the Department of Justice under the new Attorney General notified the Court of Appeals that it would defend the constitutionality of § 399 on behalf of defendant. The Court of Appeals remanded the action to this Court for consideration of the effect of this development. On June 18, 1981 this Court vacated its order of dismissal holding that "the Executive Branch's decision to enforce the statute has eliminated any uncertainty about the existence of an actual case or controversy." The appeal was subsequently dismissed and the Senate was granted leave to withdraw from this litigation.

Plaintiffs' original motion for summary judgment, which had been continued by stipulation pending resolution of the Senate's motion to dismiss, was thus again before the Court. Oral argument of this motion

was set for August 3, 1981 and the parties were given an opportunity to file supplemental briefs.

Several days prior to the scheduled oral argument, however, Congress amended § 399 in a significant respect. The Court, therefore, continued oral argument of the plaintiffs' motion. On August 13, 1981 the President signed the Public Broadcasting Amendments Act of 1981, Pub. L. No. 97-35, 95 Stat. 725-36 (1981). This Act limited the scope of § 399's prohibition of editorializing to apply only to those public television and radio stations which receive grants from the federal government through CPB. No change was made in that portion of § 399 which prohibited all public broadcasters from supporting or opposing any candidate for political office.[4]

The parties were given an opportunity to file supplemental papers discussing the effect of this amendment, and plaintiffs were given leave to file an amended complaint to reflect this change. In the amended complaint, filed on October 2, 1981, plaintiffs altered the scope of this litigation in an important respect by dropping their challenge to that portion of § 399 which prohibits public broadcasting stations from supporting or opposing political candidates. Plaintiffs focused their attack instead solely on the statutory ban on editorializing by public broadcasters receiving federal grants from CPB.

Defendant moved to dismiss the amended complaint specifically basing its motion to dismiss on grounds

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[4] 47 U.S.C. § 399 as amended provides: "No noncommercial educational broadcasting station which receives a grant from the Corporation [CPB] under subpart C of this part [47 U.S.C. § 396] may engage in editorializing. No noncommercial educational broadcasting station may support or oppose any candidate for political office."

identical to those raised in opposition to plaintiffs' original motion for summary judgment insofar as they were still applicable to the new complaint. In light of the long and convoluted procedural history of this case, the Court deemed plaintiffs' original motion for summary judgment to be before the Court as a motion for summary judgment on the amended complaint and treated defendant's motion to dismiss as a cross motion for summary judgment.

Oral argument of these motions was heard by this Court, the Honorable Malcolm M. Lucas, District Judge, presiding, on November 9, 1981 and taken under submission. After careful consideration of all of the papers filed and of the oral arguments of counsel, the Court grants summary judgment in favor of plaintiffs.

The material facts underlying this action are not disputed. Plaintiff League of Women Voters of California (the "League") is a non-profit, non-partisan organization incorporated in the State of California. One of the purposes of the League is to promote political responsibility through informed and active citizen participation in government. Plaintiff Henry Waxman ("Waxman") is a United States Congressman. Waxman is also a regular listener and a viewer of public radio and television.

Plaintiff Pacifica Foundation ("Pacifica") is a nonprofit educational corporation which owns and operates noncommercial educational broadcasting stations in five major markets in the United States. Pacifica and its stations have received and presently receive grants from CPB and come, thus, within the scope of § 399's prohibition on editorializing.

Defendant FCC is an administrative agency created pursuant to the Communications Act of 1934, ch. 652, § 1, 48 Stat. 1064 (1934) (current version at 47

U.S.C. 151 (1976)) for the purpose of regulating radio and wire communication. The FCC is charged with executing and enforcing the provisions of the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.* (1976) which includes § 399 as amended.

This Court's order of June 18, 1981 vacating the Court's previous order of dismissal, makes clear that plaintiff Pacifica has standing to bring this action. As the Court noted in that order, Pacifica now faces "a very realistic threat of severe administrative and penal sanctions" if it violates § 399. Thus, Pacific has a sufficient stake in the outcome of this litigation even without violating § 399 to warrant its invocation of federal court jurisdiction and to justify exercise of the Court's remedial powers on its behalf. *Babbitt* v. *United Farmworkers*, 442 U.S. 289, 298 99 S.Ct. 2301, 2308-09, 60 L.Ed. 2d 895 (1979); *Warth* v. *Seldin*, 422 U.S. 490, 498-99, 95 S.Ct. 2197, 2205, 45 L.Ed. 2d 343 (1975).

Plaintiffs League and Waxman seek no relief independent of the declaratory and injunctive relief sought by Pacifica. Thus, resolution of Pacifica's claims will effectively dispose of the claims raised by the League and Waxman. Under these circumstances, it is not necessary at this time to consider separately the question of whether the League and/or Waxman would have standing to maintain this action absent Pacifica. *Cf. Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264 n.9, 97 S.Ct. 555, 562 n.9, 50 L.Ed 2d 450 (1977) (not necessary to examine the standing of all of the plaintiffs where one plaintiff had standing to raise the legal issues presented on appeal); *Legal Aid Society of Alameda County* v. *Brennan*, 608 F.2d 1319, 1334 (9th Cir.

1979) ("[I]t is unnecessary to examine the standing of all appellees so long as one had standing to secure the requested relief.")

Pacifica contends that § 399's prohibition of editorializing by certain public television and radio stations violates both the First Amendment and the Equal Protection Clause of the Fifth Amendment. The Court will address each of these challenges in turn.

I. FIRST AMENDMENT CHALLENGE

Section 399 prohibits all editorializing by noncommercial educational television and radio stations which receive funds from CPB under 47 U.S.C. § 396 ("funded noncommercial broadcasters"). The FCC has construed § 399 as prohibiting only the "use of noncommercial educational broadcast facilities by licensees, their management or those speaking on their behalf for the propagation of the licensees' own views on public issues. . . ." *In re Complaint of Accuracy in Media, Inc.*, 45 F.C.C. 2d 297, 302 (1974). Section 399 does not, therefore, prevent funded noncommercial broadcasters from presenting a wide range of programs containing editorial content if it is made clear that the editorials are not made on behalf of the licensee or its management. Indeed, § 399 has even been construed as permitting "the expression of views on public issues by employees of a noncommercial educational broadcast station in their capacity as individuals . . . provided the surrounding facts and circumstances do not indicate that such views are represented or intended as the official opinion of the licensee or its management." *In re Complaint of Accuracy in Media, Inc., supra*, 45 F.C.C. 2d at 302.

See also, Walker & Salveter, 32 Rad. Reg. 2d 839, 846 (1955).[5]

Despite this narrow construction of § 399, it cannot be denied that the ban on editorializing limits the means by which certain noncommercial licensees may participate in the debate of issues of public interest and importance and, thus, raises a serious question under the First Amendment. *Consolidated Edison Co.* v. *Public Service Comm.*, 447 U.S. 530, 535, 100 S.Ct. 2326, 2331-32, 65 L.Ed 2d 319 (1980). The discussion of such issues lies at the heart of the First Amendment's protections. *See, First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 776, 98 S.Ct. 1415-16, 55 L.Ed.2d 707 (1978); *Mills* v. *Alabama*, 384 U.S. 214, 218-19, 86 S.Ct. 1434, 1436-37, 16 L.Ed. 2d 484 (1966); *Thornhill* v. *Alabama*, 310 U.S. 88, 101-102, 60 S.Ct. 736, 744, 84 L.Ed 1093 (1940).

Courts have consistently held that statutes restricting the discussion of public issues can withstand scrutiny under the First Amendment only if they serve a compelling state interest and are narrowly tailored to that end. *See, Consolidated Edison Co.* v. *Public Service Comm'n, supra*, 447 U.S. at 535, 540-544, 100 S.Ct. n.4, 2332, 2334-2336; *First Nat'l Bank of Boston* v. *Bellotti, supra*, 435 U.S. at 786, 98 S.Ct. at 1421; *Rosen* v. *Port of Portland*, 641 F.2d 1243, 1246 (9th Cir. 1981); *Community-Service Broadcasting* v. *FCC*, 593 F.2d 1102, 1111 (D.C. Cir. 1978).

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[5] Although this interpretation of § 399 was developed in connection with the prior, broader version of § 399 set out above in footnote 1, there is no indication that the FCC will adopt a different position under the amended statute. Nor is there any indication that Congress, in amending § 399, intended to affect this interpretation.

Defendant has suggested, however, that "special," less stringent standards should be applied in this case because it involves the broadcast media. In support of this position, defendant cites the Supreme Court's statement in *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 748, 98 S.Ct. 3026, 3039-40, 57 L.Ed. 2d 1073 (1978), that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." This statement, however, taken out of context, is misleading. A more precise yet equally concise statement of the applicable principle is found in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 386, 89 S.Ct. 1794, 1805, 23 L.Ed 2d 371 (1969) where the Supreme Court recognized that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."

Thus, while it is true that some regulation of speech is permitted in the context of the broadcast media which would not be permitted with respect to speech communicated in some other fashion, any such result must be explicable in terms of differences in the characteristics of the broadcast media. For example, in *Pacifica Foundation*, *supra*, the Court upheld the FCC's power to impose informal sanctions against broadcasters of patently offensive speech on the basis of two special characteristics of the broadcast media. First, the Court noted that "because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content." *Id.*, 438 U.S. at 748, 98 S.Ct. at 3040. Second, the Court recognized the fact that "broadcasting is uniquely accessible to children." 438 U.S. at 749, 98 S.Ct. at 3040. These two special factors obviously have no relevance to consideration of the restriction on editorializing imposed

by § 399. Other characteristics of broadcast media would have to be demonstrated and shown to require the limitation here at issue.

Defendant has not brought to the Court's attention any special characteristic of the broadcast media which would jusify the application of less stringent First Amendment standards in the present case. Nor is the Court aware of any such special characteristics. The Court, therefore, rejects defendants' argument that review under the First Amendment of the ban on editorializing imposed by § 399 should be less stringent simply because it arises in the context of the broadcast media. Section 399 can survive scrutiny under the First Amendment only if it meets the standard generally used in First Amendment cases, that is, that it serves a compelling government interest and is narrowly tailored to that end.

It is well established that regulations such as § 399 are presumptively unconstitutional and that the government bears the burden of justification. *See Consolidated Edison Co.* v. *Public Service Comm'n, supra,* 447 U.S. at 540, 100 S.Ct. at 2334; *Rosen* v. *Port of Portland, supra,* 641 F.2d at 1246; *Kuszynski* v. *City of Oakland,* 479 F.2d 1130, 1131 (9th Cir. 1973). Defendant makes two arguments in attempting to meet its burden of justifying the restrictions upon speech imposed by § 399. First, defendant contends that § 399 serves a compelling government interest in ensuring that funded noncommercial broadcasters do not become propaganda organs for the government. Second, defendant argues that § 399 serves a compelling government interest in preventing government funding from interfering with the balance presentation of opinion on funded noncommercial stations. The Court will address each of these arguments in turn.

Defendant notes correctly that during the hearings and debates which preceded passage of the Public Broadcasting Act of 1967, several members of Congress expressed concern that government funding of noncommercial broadcasters brought with it the danger of government control. *See e.g.*, 113 Cong. Rec. 12,992 (1967) (remarks of Sen. Thurmond); 113 Cong. Rec. 26,384 (1967) (remarks of Rep. Staggers); 113 Cong. Rec. 26,394 (remarks of Rep. Brotzman).[6] The Court agrees that the fear of government control, if justified, might constitute a compelling government interest sufficient to justify the restrictions imposed by § 399. The evidence presented, however, indicates that this fear is not justified.

There is often reason to fear that "he who pays the piper calls the tune." Yet this fear is greatly reduced, where the "piper" receives funds from many different sources. Although little competent evidence has been presented to the Court, the parties agree that CPB funding in 1977 did not constitute more than approximately 25% of the funding received by funded noncommercial broadcasters and that no broadcaster receives more than approximately 33% of its funds through CPB grants. The parties also appear to agree that many of the stations which fall within the prohibition of § 399 receive substantially less than 25% of their funds in the form of CPB funding. Pacifica, for example, alleges that it received only 14% of its total revenues from CPB

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[6] The Court notes that some legislators also expressed personal concerns about permitting public broadcasters to editorialize. This aspect of the legislative history is discussed briefly in *Community-Service Broadcasting v. FCC*, 593 F.2d 1102, 1128 n.25 (D.C. Cir. 1978). Clearly such personal interests are not legitimate government interests.

Community Service Grants in 1978. It should also be noted that Congress has recently reduced the level of fundings authorized under 47 U.S.C. § 396 for fiscal years 1984-1986. Public Broadcasting Amendments Act of 1981, Pub. L. No. 97-35, § 1227, 95 Stat. 727 (1981) (to be codified at 47 U.S.C. § 396(k)(1)(c)). Such a reduction of funds can only serve to reduce the danger of government control. In light of the modest level of government funding, the expressed fear of government manipulation of the broadcast media does not seem to be justified.

This fear appears even more speculative when one considers the numerous additional safeguards which have been built into the funding system to ensure that funded noncommercial broadcasters remain free of government control. The CPB, which disburses all funds under 47 U.S.C. § 396, is an independent, nonprofit, private corporation. It was established in this form specifically "to remove the [noncommercial] programming activity from governmental supervision." H.R. Rep. No. 572, 90th Cong., 1st Sess. 19-20 (1967) *reprinted in* [1967] *U.S. Code Cong. & Ad. News* 1799, 1810. To this end, CPB is governed by an appointed Board of ten directors, no more than six of whom may be members of the same political party. 47 U.S.C.A. § 396(c)(1) (West Supp. 1982).[7] The CPB cannot own or operate any station, network, or interconnection facility or produce, schedule or disseminate programming. 47 U.S.C.A. § 396(g)(3) (West Supp. 1982). Furthermore, funding decisions are based on objective, nondiscretionary criteria. Thus, even were the CPB not sufficiently insulated from political control, it would be

[7] As amended by the Public Broadcasting Amendments Act of 1981, Pub.L.No. 97-35, § 1225, 95 Stat. 725-27 (1981).

difficult to manipulate funding decisions along political lines.[8] No evidence has been presented which even suggests that CPB has failed in its statutory duty "to afford maximum protection [to public broadcasters] from extraneous interference and control." 47 U.S.C.A. § 396(a)(7) (West Supp. 1982).

Even if the CPB were ineffective in insulating funded noncommercial broadcasters from governmental influence, still another safeguard works to ensure that such broadcasters will not become mouthpieces for the government. This protection is provided by the fairness doctrine.[9] This doctrine "imposes two affirmative responsibilities on the broadcaster: coverage of issues of public importance must be adequate and must fairly reflect differing viewpoints." *Columbia Broadcasting System, Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 111, 93 S.Ct. 2080, 2090, 36 L.Ed.2d 772 (1973). Under this doctrine a broadcast licensee cannot present one-sided political propaganda for whatever reason.

The modest level of government funding, the protective insulation of the CPB, and the restrictions of the fairness doctrine all work to ensure that funded

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[8] *See*, Carnegie Commission on the Future of Public Broadcasting, *A Public Trust: The Report of the Carnegie Commission on the Future of Public Broadcasting*, 124-25 (1979):

> "Because eligibility for receipt of federal funds and the amount of the [grant] are determined by objective quantitative means, the system is well positioned to avoid review of program content as a condition for increased funding . . . Thus, licensees do not really 'earn' their [grants] with any specific program or service."

[9] For a summary of the development of the fairness doctrine see *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 375-386, 89 S.Ct. 1794, 1799-1804, 23 L.Ed. 371 (1969).

noncommercial broadcasters will not be vulnerable to attempts to use them as propaganda organs for the government. Nor will funded noncommercial broadcasters be influenced to take particular editorial positions in order to curry favor with the government. Both the "stick" and the "carrot" of federal funding have been effectively eliminated.

The legislative history of § 399 confirms that Congress did not view § 399's ban on editorializing as a necessary means to a compelling end. Rather, § 399 was added out of an "abundance of caution." H.R. Rep. No. 572, 90th Cong., 1st Sess. 20 (1967) *reprinted in* [1967] *U.S. Code Cong. & Ad. News* 1799, 1810. Such prudence, while otherwise commendable, does not justify § 399's restriction on speech. The Court must, therefore, reject defendant's contention that fear of government control of funded noncommercial broadcasters presents a compelling government interest which will enable § 399's ban on editorializing to survive scrutiny under the First Amendment.

Defendant also argues that restrictions on editorializing are necessary to ensure that government funding of noncommercial broadcast stations will not interfere with the balanced presentation of opinion on those stations. This argument finds its origin in discussions held in the early years of the regulation of broadcasting. More than forty years ago, the FCC adopted a prohibition of all editorializing by broadcast stations, both commercial and noncommercial. *See In re Mayflower Broadcasting Corp.*, 8 F.C.C. 333, 339-341 (1940). This policy was reconsidered and abandoned by the FCC in 1949. In the report which led to this important policy change, the FCC discussed both the pros and cons of permitting broad-

cast licensees to editorialize. *In re Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949). Opponents of a change in policy argued that:

> [O]vert editorialization by broadcast licensees would not be consistent with the attainment of balanced presentations since there was a danger that the institutional good will and the production resources at the disposal of broadcast licensees would inevitably influence public opinion in favor of the positions advocated in the name of the licensee and . . . having taken an open stand on behalf of one position in a given controversy, a license [*sic*] is not likely to give a fair break to the opposition.

Id., at 1253. The FCC, while not entirely disagreeing with the assumptions underlying this line of argument, did not reach the same conclusion:

> If it be true that station good will and licensee prestige, where it exists, may give added weight to opinion expressed by the licensee, it does not follow that such opinion should be excluded from the air. . . . In any competition for public acceptance of ideas, the skills and resources of the proponents, and opponents will always have some measure of effect in producing the results sought. But it would not be suggested that they should be denied expression of their opinions over the air by reason of their particular assets . . . Assurance of fairness must in the final analysis be achieved, not by the exclusion of particular views because of the source of the views, or the forcefulness with which the view is expressed, but by making the microphone available for the presentation of contrary views with-

> out deliberate restrictions designed to impede equally forceful presentation.

Id., at 1253-54.

Defendant contends that Congress may well have decided to prohibit editorializing by funded noncommercial broadcasters because it agreed with the position taken by the FCC prior to 1949 rather than the position adopted in 1949. Defendant appears to argue that this pre-1949 position could have appeared especially convincing to Congress because a public broadcaster's good will and institutional prestige were, in large part, "created" by federal funding and were not truly "earned." There are, however, two problems with this argument. First, there is absolutely no indication that Congress did, in fact, originally enact or amend § 399 for the reasons suggested by defendant. Second, although there is much to be said for a complete prohibition of editorializing by all broadcast licensees as a rational attempt to foster balanced broadcasting, this concern is not sufficiently compelling to justify the ban on speech imposed by § 399 under the First Amendment. The protections offered by the fairness doctrine effectively eliminate any substantial danger of "unbalanced" programming.

In sum, the Court holds that the right of funded noncommercial broadcasters to editorialize is entitled to the full panoply of First Amendment protections. There are no special characteristics of the broadcast media which justify the application of "special," less stringent First Amendment standards in this case. Defendants must therefore establish that § 399's ban on editorializing is narrowly tailored to serve a compelling government interest. Defendant has failed

to carry this burden. The fear that funded noncommercial broadcasters will become propaganda organs for the government is too speculative to provide such a compelling interest. The desire to ensure the balanced presentation of opinion by funded noncommercial broadcasters, even if it had been a motivating factor in the passage of § 399, also fails to provide a sufficiently compelling interest to justify the ban on editorializing imposed by that statute. The Court holds that § 399 violates the First Amendment insofar as it prohibits funded noncommercial broadcasters from editorializing.

II. THE FIFTH AMENDMENT CHALLENGE

Pacifica also challenges § 399 under the Equal Protection Guarantee embodied in the Due Process Clause of the Fifth Amendment. This guarantee, like the Equal Protection Clause of the Fourteenth Amendment, requires both that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives, and that any distinctions drawn between speakers must be carefully scrutinized. *Carey* v. *Brown*, 447 U.S. 455, 461-62, 100 S.Ct. 2286, 2290-91, 65 L.Ed. 263 (1980). *See also Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 98-99, 92 S.Ct. 2286, 2291, 33 L.Ed. 212 (1972).

Pacifica argues that many noncommercial and commercial broadcasters which do not receive grants from CPB under 47 U.S.C. § 396 and which are, thus, not prohibited from editorializing by § 399 are "just as likely if not more so, to fall prey to government coercion," as are funded noncommercial broadcasters. In support of this argument Pacifica notes that many noncommercial broadcasters receive sub-

stantial federal funds through various federal sources other than CPB and that many stations broadcast federally funded advertising. The discretionary allocation of these funds, Pacifica contends, brings with it a more serious danger of government control than that raised by CPB funding. In addition, plaintiff points to the licensing process itself as a potential source of federal coercive power over all broadcasters.

Pacifica argues that because the danger of government coercion through these other means is as great "if not greater" than the danger posed by CPB funding, it is a violation of the Equal Protection Guarantee to prohibit funded noncommercial broadcasters from editorializing but not to prohibit editorializing by those stations which receive federal funds from other sources or which undergo periodic license renewal.

While this argument may well be taken, the Court has difficulty adopting it in the context of this motion for summary judgment. There is little if any competent evidence before the Court from which to draw any justifiable conclusion as to the dangers inherent in these potential sources of coercive power. It is quite possible that the dangers noted by Pacifica do exist and that they are more substantial than the minimal risk of government control posed by CBS funding. Nevertheless, on the basis of the evidence now before the Court, it is not possible to grant summary judgment in favor of Pacifica under the Equal Protection Guarantee of the Fifth Amendment.

The Court, therefore, bases its decision squarely on the First Amendment, holding that the restrictions imposed upon editorializing by funded noncom-

mercial broadcasters are not consistent with the guarantees of that amendment.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk shall serve, by United States mail, copies of this Order on counsel for all parties of record in this matter.

Dated: August 5, 1982

/s/ Malcolm M. Lucas
MALCOLM M. LUCAS
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV-79-1562-MML

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, ET AL., PLAINTIFFS,

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT.

SUMMARY JUDGMENT

This cause came on to be heard on motion of plaintiffs for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The Court having considered all pleadings, memoranda, and declarations submitted herein, and having heard the arguments of counsel, and having given due deliberation to this matter,

IT IS ORDERED that plaintiffs' motion for summary judgment is hereby granted, and further

ORDERED, ADJUDGED and DECREED, that

1. The prohibition against editorializing contained in 47 U.S.C. § 399 is unconstitutional as a violation of the First Amendment to the United States Constitution, and is hereby declared null and void;

2. Defendant Federal Communications Commission and any of its agents, employees and others acting in concert with it are hereby enjoined from forc-

ing or executing the prohibition against editorializing contained in 47 U.S.C. § 399;

3. Plaintiffs shall recover their costs and reasonable attorneys' fees.

IT IS FURTHER ORDERED that the Clerk shall serve, by United States mail, copies of this Judgment on counsel for all parties in this matter.

Dated: August 5, 1982

/s/ Malcolm M. Lucas
MALCOLM M. LUCAS
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CV 79-1562-MML (PX)

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, ET AL.,
PLAINTIFFS

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT

NOTICE OF APPEAL TO THE SUPREME
COURT OF THE UNITED STATES

[Filed September 3, 1982]

Notice is hereby given that the Federal Communications Commission, the defendant above-named, hereby appeals to the Supreme Court of the United States from the order granting summary judgment in favor of plaintiffs entered in this action on August 6, 1982.

This appeal is taken pursuant to 28 U.S.C. § 1252.

Respectfully submitted,

J. PAUL MCGRATH
Assistant Attorney General
STEPHEN S. TROTT
United States Attorney

/s/ Paul Blankenstein
PAUL BLANKENSTEIN

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DATED: September 2, 1982

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